the people for adoption or rejection, the change in the percentage in favor of submission is very satisfactory. Before 1830, only 19 per cent of the constitutions were submitted; between 1830 and 1860, about 90 per cent were submitted. In the third period there is a fall of about 15 per cent. This, however, is easily accounted for. Necessarily the second period, 1830-1860, is the most normal, since there were no wars to hasten the adoption of constitutions, as in 1776 and 1861, and no need to disqualify ignorant voters who already possessed the right of suffrage. On the whole it is safe to say that the practice throughout the states of the United States has been in favor of submitting the constitutions to the people wherever it was possible to do so.

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## LICENSE TAXATION BY MUNICIPAL CORPORATIONS. IS THE POWER UNLIMITED IN VIRGINIA?

*Woodall* v. *City of Lynchburg*, 4 Va. Sup. Ct. Rep. 166.

This case involved the validity of an ordinance of the City of Lynchburg imposing a license-tax of $500 per annum on the business of labor agent. Woodall, who had paid the tax under protest, brought suit to recover it back, on the ground that the tax was excessive to the extent of working a destruction to his business, and therefore unreasonable, oppressive and illegal. Upon a demurrer to the declaration, the Circuit Court held that the legislature had authorized the city in its charter to tax this business, and, as the authority was conferred without any limitation as to the amount of the tax that might be imposed, the city's powers were co-extensive with those of the legislature, and the reasonableness of the tax was a matter of discretion, residing solely with the legislative department of the city, with which discretion the judiciary had no right to interfere; and the demurrer was accordingly sustained. Upon appeal, this view was affirmed by the Court of Appeals.

It was alleged in the declaration, and admitted by the demurrer, that the business was a perfectly lawful one in itself. Being such, the exaction cannot properly be regarded as a privilege tax under

the police power; for such a tax can be imposed only on callings and professions, which, by reason of their peculiar character, may, directly or indirectly, injure the public.

Thus, Tiedeman, in his work on the Limitations of the Police Power,[1] distinguishing between a license-tax imposed for purposes of revenue and one imposed as a regulation under the police-power, says:

"It is therefore conclusive that the general requirement of a license for the pursuit of any business not dangerous to the public can only be justified as an exercise of the power of taxation or the requirement of a compensation for the enjoyment of a privilege or franchise."

And Judge Cooley, in his work on Taxation,[2] says:

"To constitute a privilege, the grant must confer authority to do something which, without the grant, would be illegal; for, if what is to be done under the license is open to every one without it, the grant would be merely idle and nugatory, conferring no privilege whatever."

In *Chicago* v. *Collins*,[3] the court, after quoting the above authorities, said:

"A license, therefore, implying a privilege, cannot possibly exist with reference to something which is a right, free and open to all."

As the occupation of "labor agent" as usually conducted has been held to be not inherently harmful or dangerous to the public,[4] the decision under discussion, especially in view of the admission of the demurrer, must be regarded as applying to a license-tax imposed for the purpose of raising revenue under the taxing power on a business not *per se* likely to be injurious to the public.

Viewed as such, the precedent cannot fail to strike the profession as being a most dangerous one; for, if the legislature and the city councils throughout the State can pervert the power of taxation for the avowed purpose of destroying one legitimate business, they can, by the same method, compass the destruction of all, and the citizen and his right to earn a living are completely at the mercy of the tax-laying power. It is useless to indulge the presumption that the legislature will act fairly by the citizen in the exercise of this important power when instances of its abuse are of almost daily occurrence. If experience justified such a presumption, there would be no need of a written constitution.

The Virginia court, after laying down the proposition that where

[1] p. 281.

[2] (6th ed.), p. 243.

[3] 175 Ill. 445, 49 L. R. A. 412.

[4] State *v.* Moore, 104 N. C. 714, 22 L. R. A. 472.

the legislature confers upon a municipality the general power of taxation, it grants all the powers possessed by itself, said:[5]

"The power of the council of the city of Lynchburg to impose the tax complained of must, therefore, be regarded in the same light as if an act of the legislature imposing such tax were called in question."

and proceeded to discuss the ordinance in question as if it were an act of the legislature.

This view leaves out of consideration the important distinction between the powers of the legislature, acting as the representative of the State, and the powers of a municipality, acting in a subordinate capacity, exercising delegated powers only.

The legislature is, of course, a sovereign, and has absolute power of legislation, and unlimited discretion in the imposition of taxes, except where restrained by the Constitution.

Not so, however, as to municipalities. They, on the contrary, are governments of limited and delegated powers, and no matter how broad the power of taxation conferred upon them, it would seem that such powers must be exercised not only within constitutional limits, but also in conformity with the broad principles of common right, inherent in every just government and transmitted to us by our ancestors as a part of the common law. Indeed, such a limitation is imposed in this State by express statute.

The Virginia Code[6] provides that:

"Where the council or authorities of any city or town, or any corporation, board or number of persons are authorized to make ordinances, by-laws, rules, regulations or orders, it shall be understood that the same must not be inconsistent with the constitution *and laws* of the United States *or of this State.*"

The common law is, of course, as much a part of the laws of this State as are the acts of the legislature.[7]

The policy of the common law with respect to equality of right is thus stated in *Simrall* v. *City of Covington*:[8]

"Perhaps the most distinguishing feature of the common law is its regard for the protection and equality of individual rights. It is a rule, therefore, that where the by-law of a municipal corporation, enacted under a general grant of power or by virtue of its incidental authority, is unfair and partial in its operation, it will be declared void. *It will not be upheld if it be unreasonable and oppressive. It must not contravene common right or the general law of the State,* nor make unwarranted or special discriminations."

[5] 4 Sup. Ct. Rep. 168.

[6] Sec. 5, Sub-div. 15.

[7] Code of Va., sec. 2.

[8] 90 Ky. 444. 29 Am. St. Rep. 398.

In his work on Constitutional Limitations,[9] Judge Cooley says:

"Municipal by-laws must also be reasonable. Whenever they appear not to be so, the court must, as a matter of law, declare them void . . . . So, a by-law, to be reasonable, should be in harmony with the general principles of the common law."

In Dillon on Municipal Corporations,[10] the learned author thus states the law:

"Special and unwarranted discrimination, or unjust or oppressive interference in particular cases is not to be allowed. The powers vested in municipal corporations should, as far as practicable, be exercised by ordinances general in their nature and impartial in their operation."

In *Kirkham* v. *Russell*,[11] the Virginia Court, quoting with approval from Dillon on Municipal Corporations, said:

"Where the power to legislate on a given subject is conferred and the mode of its exercise is not prescribed, then an ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid."

And the Court added:

"And especially is this so in respect to municipal corporations. For as upon them is conferred a portion of the authority which properly appertains to the sovereign power of the State, the public interests require that they be confined not only to the powers, but to a reasonable exercise of the powers which are clearly granted by the terms of their charters."

And it said further:[12]

"It is essential to the validity of an ordinance that it be reasonable."

In *Morton* v. *Mayor*,[13] the city council of Macon, Ga., under charter authority to "levy and collect a license-tax upon all persons exercising any profession, trade or calling within said city," imposed a prohibitory license-tax on all persons engaged in the business of lending money on household or kitchen furniture. The court held that, as the business thus taxed was a legitimate one, and not *per se* injurious to the public, the city could not destroy it by the imposition of a prohibitory license-tax, saying:

"The city of Macon may tax occupations, but there is nothing in its charter which either expressly or by implication authorizes it to directly suppress any legitimate business, or to indirectly accomplish such a result under the guise of an ordinance purporting to impose a license tax for the

[9] pp. 200, 202.
[10] Vol. 1, sec. 322.
[11] 76 Va. 961.
[12] p. 962..
[13] 111 Ga. 162, 36 S. E. 627.

purpose of raising revenue, but having for its real object the prohibition of that very business."

In *Caldwell* v. *City of Lincoln,*[14] where a license tax of $120 was imposed upon the business of selling bankrupt goods at auction, the court, holding the business to be a lawful and useful one, said of the imposition:

"But it must be in the nature of a tax, and not so oppressive as to prohibit, and it must be reasonable considering the nature of the business or occupation. The ordinance in this case is clearly in conflict with both of these principles, and is void."

And in *Hirshfield* v. *City of Dallas,*[15] the Court of Appeals of Texas, speaking of an ordinance imposing a license-tax on the business of ticket-broker, and after stating that the evidence established the fact of its being prohibitory, said:

"If it be true, then the tax amounted to an absolute prohibition of an occupation, the pursuit of which was beyond the power of the corporation to prohibit, the occupation not being *per se* injurious to the public."

But even if the ordinance imposing this tax can properly be regarded in the same light as if it were an act of the legislature, it is a startling proposition, to say the least, that the power of taxation is, in this State, unlimited—resting entirely with the legislature.

The court, in support of this view, cited two authorities, namely, a *dictum* of Chief Justice Marshall in *Weston* v. *Charleston,*[16] and Cooley on Constitutional Limitations,[17] in support of the proposition that the power of taxation, except where restrained by the organic law, is unlimited.

It is strange that Judge Cooley should have been relied on as upholding this doctrine in his work on Constitutional Limitations, and repudiated when he most emphatically lays down a contrary doctrine in his work on Taxation. In the latter work,[18] he says:

"A tax laid for the double purpose of regulation and revenue must be grounded on both the police and the taxing power; *but the grant of the power to tax would not authorize the imposition of a burden in its nature and purpose prohibitory.*"

And again,[19] the same author says:

"The terms in which a municipality is empowered to grant licenses will be expected to indicate with sufficient precision whether the grant is con-

[14] 29 N. W. 649.
[15] 4 Tex. Ct. of App. 259, 15 S. W. 124.
[16] 2 Pet. 449.
[17] (4th ed.), pp. 587-588.
[18] (1st ed.), p. 11.
[19] Id., p. 408.

ferred for the purposes of revenue, or whether, on the other hand, it is given for regulation merely. . . . If a revenue authority is what seems to be conferred, the extent of the tax, when not limited by the grant itself, must be understood to be left to the judgment and discretion of the municipal government, to be determined in the usual mode in which its legislative authority is exercised; but the grant of authority to impose fees for purposes of revenue would not warrant their being made so heavy as to be prohibitory, thereby defeating the purpose."

It would seem that the Supreme Court of Virginia stands against the great preponderance of authority in upholding the doctrine it has laid down, for it does not appear that the text-writers or the courts of a majority of the other states have upheld any such view, while the principle as announced by Mr. Justice Cooley in his work on Taxation has been concurred in by the numerous authorities cited in the foot-note.[20]

But this *dictum* of Chief Justice Marshall, even if true in his day, can hardly be said to be true now, especially in Virginia, where so many safeguards to the liberty of the citizen have been thrown around him by the Constitution. The very idea of an unlimited power of taxation—a power wholly uncontrolled by any considerations of necessity for revenue or sound public policy—is repugnant to the genius of a free government. Of what value is our boasted liberty if it is subject to the arbitrary and uncontrolled will of a legislature that may tax us to death, and that, too, whether the tax be necessary or not?

It would seem that the language of our Constitution is neither indefinite nor uncertain on this important subject:

Thus, it is provided[21] that—

"No other or greater amount of tax or revenue shall at any time be levied than may be required for the *necessary expenses* of the government, or to pay the existing indebtedness of the State."

If this Constitutional provision means anything, it is certainly a restriction on the right of the legislature to impose taxation greater than is required for these two purposes. It is true the language does not in terms apply to cities, but it is difficult to conceive of the legislature having a right to confer upon cities a power greater than that possessed by itself.

[20] Morton *v.* Mayor &c., Caldwell *v.* City of Lincoln, State *v.* Moore, Hirschfield *v.* City of Dallas, Cooley on Taxation (all *supra*); Moore *v.* St. Paul, 48 Minn. 331, 30 L. R. A., n. e. p. 439; *Ex parte* Burnett, 30 Ala. 461; Lyons *v.* Cooper, 39 Kan. 324, 18 Pac. 296; 13 Am. & Eng. Enc. of L. (1st ed.), p. 532; City of Ottumwa *v.* Zekind (Ia.) 29 L. R. A. 734.

[21] Const. of Va., Art. X, sec. 20.

Again, sec. 1 of our Bill of Rights defines the "enjoyment of life and liberty, with the *means of acquiring and possessing property,*" as being an "inherent" and inalienable right of every freeman. As the pursuit of a legitimate business or occupation is one of the "means of acquiring" property, it would seem to follow of necessity that the right to pursue such a calling cannot be taken away entirely by the legislature unless the necessities of the government require it—certainly not when the demand is made for the *avowed purpose of destroying the business,* as was done in the case under review. If it be contended that the power of taxation is unlimited, it may be answered that the right of the citizen to follow a lawful business is an inherent, absolute and inalienable one; and while this right must yield to the dictates of governmental necessity, it should never yield further than this. Why say that no government can deprive the citizen of his right to follow any lawful calling he may see fit to follow, when, by a perversion of the legitimate uses of taxation any government can arbitrarily appropraite to itself all the profits of the business, leaving no reward to the citizen who follows it?

In the *Slaughter House Cases,*[22] Mr. Justice Bradley said:

"I hold that liberty of pursuit, the right to follow any of the ordinary callings of life, is one of the privileges of the citizen of which he cannot be deprived without invading his right to liberty, within the meaning of the Constitution."

And Tiedeman in his work on the Limitations of the Police Power,[23] after stating the general doctrine to be that the legislature may prohibit the prosecution of a trade or business injurious to the public, says:

"But if the business is not inherently harmful, the prosecution of it cannot be rightfully prohibited to one who will conduct the business in a proper and circumspect manner. Such an one would be deprived of his liberty without due process of law."

In Burroughs on Taxation,[24] the author says:

"The proposition that the power to tax is the power to destroy is in opposition to the fundamental principles of free government. The power of taxation is one of the legislative powers to be used to raise revenue for governmental purposes. It is not to be used for private purposes, nor to suppress one branch of industry to foster another, and when such appears to be clearly the purpose of a tax law, it has been declared void."

[22] 111 U. S. 746. [23] p. 290. [24] p. 508.

And Judge Cooley, in his work on Taxation,[25] referring also to Chief Justice Marshall's celebrated *dictum,* says:

"It may justly be questioned whether this strong statement, which was put forth as a defence against an injurious tax, will fairly justify an affirmative exercise of power that has not revenue in view, but is only called a tax in order that it may be employed as an instrument of destruction."

As old Shylock truly said to Portia:

"You take my house when you take the prop
That doth sustain my house; you take my life,
When you do take the means whereby I live."

It is earnestly to be hoped that those who are soon to re-assemble to put the finishing touches on our new Constitution will not fail to counteract the effect of this important decision by limiting the powers of cities in the matter of taxation, as has already been done under the present Constitution, to the powers of the legislature.

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[25] (1st ed.), p. 10.